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Immigration and Naturalization Service

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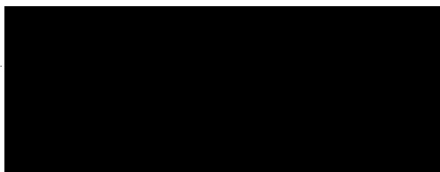
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OFFICE OF ADMINISTRATIVE APPEALS

425 Eye Street N.W.

ULLB, 3rd Floor

Washington, D.C. 20536



File: WAC 01 282 59819

Office: CALIFORNIA SERVICE CENTER Date:

JAN 22 2003

IN RE: Petitioner:
Beneficiary:



Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

IN BEHALF OF PETITIONER: SELF-REPRESENTED

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty cook. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 CFR 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter turns, in part, on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Matter of Wing's Tea House, 16 I & N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's priority date is September 23, 1997. The beneficiary's salary as stated on the labor certification is \$11.55 per hour or \$24,024 per year.

The petitioner initially submitted insufficient evidence of its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. On January 7, 2002, the director requested federal tax returns from 1997 to the present, quarterly wage reports for the

last four quarters, and the job title and duties of each employee on the reports (Form I-797).

The petitioner submitted copies of its 1997, 1998, 1999, and 2000 Form 1040 U.S. Individual Income Tax Returns. The director determined that, for no year, did the adjusted gross income, net profit, or wages paid equal or exceed the proffered wage. The director concluded that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date and continuing to the present and denied the petition.

On appeal, the petitioner states in full,

In the income taxes we did not prove that I can pay the salary but I do have the enought (sic) to pay the salary to the alien because we have many (sic) in the bank because we will invest on a new restaura (sic) very soon in the bank I have the amount of \$ (sic)
Please feel free to verify this information if you need to.

The petitioner submits on appeal a bank statement of March 30 through April 30, 2002, reflecting an ending balance of \$64,641.73. This evidence is not persuasive.

Even though the petitioner submitted its commercial bank statement as evidence that it had sufficient cash flow to pay the proffered wage, there is no evidence that it somehow shows additional funds that the tax returns do not reflect. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See Matter of Treasure Craft of California, 14 I & N Dec. 190 (Reg. Comm. 1972).

Apparently, the petitioner plans to invest funds in the bank in a new restaurant, though the amount is blank. Funds already spent for other purposes are not available to pay the proffered wage. Further, the bank balance does not relate to the priority date. The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate the financial ability continuing until the beneficiary obtains lawful permanent residence. See Matter of Great Wall, 16 I & N Dec. 142, 145; Matter of Wing's Tea House, 16 I & N Dec. 158 (Act. Reg. Comm. 1977); Chi-Feng Chang v. Thornburgh, 710 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. 8 CFR 204.5(g)(2). 8 CFR 103.2(b)(1) and (12).

Beyond Form I-797 and the director's decision, the terms of the Form ETA 750 in Blocks 14 and 15 imposed certain qualifications on the beneficiary. They included evidence of the beneficiary's high school education, two years of experience in the job offered, and references.

8 CFR 103.2(b) states in pertinent part,

Evidence and processing - (1) General. An applicant or petitioner must establish eligibility for a requested immigration benefit. An application or petition form must be completed as applicable and filed with any initial evidence required by regulation or by the instruction on the form. Any evidence submitted is considered part of the relating application or petition.

(1) Submitting secondary evidence and affidavits - (i) General. The non-existence or other unavailability of required evidence creates a presumption of ineligibility...

A labor certification is an integral part of this petition, but the issuance of a labor certification does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the training, education, and experience specified on the labor certification as of the petition's priority date. Matter of Wing's Tea House, 16 I & N Dec. 158 (Act. Reg. Comm. 1977).

Though not a basis of this decision, the director did not request and the petitioner did not submit evidence to establish that the beneficiary was eligible for the position.

After a careful review of the tax returns and submissions on appeal, it is concluded that the evidence does not establish the petitioner's ability to pay the proffered wage at the priority date and continuing to the present.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.